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9 UNITED STATES DISTRICT COURT
10 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

11 POINT RUSTON, LLC, et al.,

12 Plaintiffs,

13 v.

14 PACIFIC NORTHWEST REGIONAL
15 COUNCIL OF THE UNITED
16 BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, et al.,

17 Defendants.
18

CASE NO. C09-5232BHS

ORDER GRANTING IN PART
PLAINTIFFS' MOTION TO
COMPEL AND DENYING
DEFENDANT JOBS WITH
JUSTICE'S MOTION FOR
PROTECTIVE ORDER

19 This matter comes before the Court on Plaintiffs' motion to compel production of
20 documents (Dkt. 95) and Defendant Jobs With Justice's ("JWJ") counter-motion for a
21 protective order (Dkt. 101). The Court reserved final ruling on these motions pending
22 JWJ's response to the Court's show cause order regarding the motions (Dkt. 132). JWJ
23 filed its response to the show cause order (Dkt. 145). The Court has considered the
24 pleadings filed in support of and in opposition to these motions, the response to the show
25 cause order, and the remainder of the file and hereby grants in part Plaintiffs' motion to
26 compel and denies JWJ's counter-motion for a protective order as discussed herein.
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I. PROCEDURAL BACKGROUND

On April 21, 2009, Plaintiffs filed their complaint against Defendants. Dkt. 1. On May 22, 2009, Defendants answered (Dkt. 20) and then filed an amended answer on May 29, 2009. On June 17, 2009, the case was reassigned to the undersigned. Dkt. 32. On September 10, 2009, Plaintiffs filed a motion to compel production of documents. Dkt. 79. On September 21, 2009, JWJ filed its response to this motion (Dkt. 83) and Plaintiffs replied on September 25, 2009 (Dkt. 88). On September 30, 2009, the Court denied Plaintiffs' motion to compel (Dkt. 79) but permitted renewal of the motion should it become necessary. Dkt. 90.

On October 27, 2009, Plaintiffs renewed their motion to compel production of documents (Dkt. 95) for which a response was filed on November 9, 2009 (Dkt. 109) and Plaintiffs replied on November 13, 2009 (Dkt. 117). On October 29, 2009, JWJ filed a counter-motion for protective order (Dkt. 101) regarding the same materials in Plaintiffs' motion to compel (Dkt. 95). On November 9, 2009, Plaintiffs filed a response to the counter-motion for protective order (Dkt. 106), and on November 13, 2009, JWJ replied (Dkt. 111).

On December 18, 2009, the Court entered a preliminary order on these motions (Dkts. 95 and 101). Dkt. 132. In that order, the Court ordered JWJ to show cause why certain of these documents should be protected under the work product doctrine. On January 12, 2010, JWJ filed its response to the show cause order. Dkt. 144 (supporting this response with the Declaration of Jacob Carton, Dkt. 145).

II. FACTUAL BACKGROUND

This matter arises out of a general construction contractors' allegations that the Defendants engaged in secondary boycott activities and engaged in several state law violations, to include such illegal activity as trespass and defamation. See generally Dkt. 76 (setting out detailed factual record). This Court has jurisdiction over the secondary boycott claim based on federal question jurisdiction under 28 U.S.C. § 1331 and over the

1 supplemental state law claims pursuant to 28 U.S.C. § 1367. See Dkt. 56 (discussing the
2 jurisdictional basis of this case).

3 The instant matter before the court concerns one issue for which the Court deferred
4 ruling on until JWJ responded to the Court's show cause order. Dkt. 132 at 11. That issue
5 is whether or not the documents sought by Plaintiffs should be protected under the work
6 product doctrine, as argued for by Defendants. *See, e.g., id.*

7 **III. DISCUSSION**

8 The work product doctrine is codified in Federal Rule of Civil Procedure 26(b)(3).
9 Pursuant to the doctrine, documents and tangible things prepared by or for a party, or the
10 party's representative, in anticipation of litigation are protected from discovery. *See In re*
11 *Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004). A representative of a party
12 includes the party's attorney, consultant, or agent. *See* Fed. R. Civ. P. 26(b)(3).

13 [T]o qualify for protection against discovery under Rule 26(b)(3),
14 documents must have two characteristics: (1) they must be "prepared in
15 anticipation of litigation or for trial," and (2) they must be "prepared by or
for [the] party [seeking the protection] or by or for that . . . party's
representative."

16 *In re Grand Jury Subpoena*, 357 F.3d at 907 (quoting Fed. R. Civ. P. 26(b)(3)) (citations
17 omitted).

18 Where an objection to discovery requests on the basis of the work product doctrine
19 is made, the objecting party must supply a privilege log that details all such documents.
20 The burden of proof lies with the proponent of the privilege and each document must be
21 tested against the adequacy of the party's privilege log and supporting material. The log
22 should conform to the guidelines set forth in the Federal Rules of Civil Procedure. *See,*
23 *e.g.,* Fed. R. Civ. P. 26(b), advisory committee notes to 1993 amendments ("the party
24 must provide sufficient information to enable other parties to evaluate the applicability of
25 the claimed privilege or protection").

26 "When there is a true independent purpose for creating a document, *work product*
27 *protection is less likely*, but when two purposes are profoundly interconnected, the
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1 analysis is more complicated.” *In re Grand Jury Subpoena*, 357 F.3d at 908 (emphasis
2 added). Documents may be protected by the work product doctrine if, “taking into
3 account the facts surrounding their creation, their litigation purpose so permeates any
4 non-litigation purpose that the two purposes cannot be discretely separated from the
5 factual nexus as a whole.” *Id.* at 910. Stated differently, even if a document has some
6 purpose other than for litigation or trial, the document is protected as work product if it is
7 substantially infused with litigation purpose. *See id.*

8 Previously the Court ordered JWJ to show cause on how the work product doctrine
9 applied to the particular documents at issue. Dkt. 132. In the show cause order, the Court
10 informed JWJ that it was inclined to grant Plaintiffs’ motion to compel “unless JWJ can
11 be more focused in establishing with some particularity why or how these documents are
12 actually work product” Dkt. 132 at 10. In the show cause order, the Court noted that
13 the privilege log did not adequately describe the documents that Defendants sought to
14 withhold under the work product doctrine.

15 Plaintiffs responded to the show cause order. Dkt. 144. This response is supported
16 by declaration. Dkt. 145, Declaration of Jacob Carton (Carton Decl.). Mr. Carton explains
17 in his declaration why JWJ believes certain documents sought by Plaintiffs are subject to
18 work product protections. *See* Carton Decl. ¶¶ 1-6. Mr. Carton states that these documents
19 were prepared in anticipation of litigation. The documents that Mr. Carton is referring to
20 are Bates Nos. 6753-6755, 6756-57, 6759-6766, 6849-52, 6906, 7098, 7111, 7132-33,
21 7172-7173. Carton Decl. ¶ 5 (JWJ’s privilege log detailing the nature of each of these
22 documents).

23 JWJ’s privilege log, embedded in the Carton Declaration, supports the Court’s
24 preliminary conclusion (Dkt. 132 at 10-11) that these documents were not actually
25 prepared in anticipation of litigation. At most, these documents may have been prepared
26 with the dual purpose of coordinating free speech activities and in anticipation of
27 litigation with Plaintiffs. *See, e.g.*, Carton Decl. ¶ 5. As an example, in describing these
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1 documents, JWJ claims the documents were given to counsel for “legal vetting” but that
2 the documents were prepared by JWJ for determining, among other things, “methods to
3 deliver free speech message” and to “draft prose to illustrate potential free speech.” JWJ
4 appears to propose the following rule: once litigation is anticipated, a party need only
5 pass documents created for other purposes by their attorney for “legal vetting” in order to
6 have the documents protected as work product. This is not the rule. *See* Fed. R. Civ. P.
7 26(b)(3).

8 Even if the Court found that these documents served a true dual purpose, the
9 documents are only able to be protected when, “taking into account the facts surrounding
10 their creation, their litigation purpose so permeates any non-litigation purpose that the
11 two purposes cannot be discretely separated from the factual nexus as a whole.” *In re*
12 *Grand Jury Subpoena*, 357 F.3d at 910. JWJ has not shown such infusion between these
13 documents. Moreover, JWJ has not provided authority for the proposition that the work
14 product doctrine protects documents created after they anticipated litigation, provided,
15 however, the documents are passed by counsel for “legal vetting.”

16 On the other hand, JWJ asserts attorney-client privilege with respect to some
17 words written on certain documents, Bates Nos. 6906, 7098, 7111, and 7132-33. To the
18 extent these words represent communications between JWJ and its counsel, they are
19 subject to the attorney-client privilege and may be redacted as such.


20 Because the Court is not persuaded by JWJ’s argument for complete protection of
21 the documents with Bates Nos. 6753-6755, 6756-57, 6759-6766, 6849-52, 6906, 7098,
22 7111, 7132-33, 7172-7173, the Court concludes these documents are to be disclosed
23 within eight days of this order and may only be redacted for attorney-client privilege or
24 first-amendment privilege consistent with the Court’s prior ruling (Dkt. 132).

1 **III. ORDER**

2 Therefore, it is hereby

3 **ORDERED** that, as discussed herein, Plaintiffs' motion to compel (Dkt. 95) is
4 **GRANTED** in part; JWJ's motion for protective order (Dkt. 101) is **DENIED**; and JWJ
5 must disclose the relevant documents within eight days of this order.

6 DATED this 18th day of February, 2010.

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10 BENJAMIN H. SETTLE
11 United States District Judge
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